IN THE
# ARIZONA COURT OF APPEALS
DIVISION TWO

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THE STATE OF ARIZONA,
*Appellee*,

*v.*

AMBER MARIE BAILEY,
*Appellant*.

No. 2 CA-CR 2014-0107
Filed July 31, 2015

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Appeal from the Superior Court in Pima County
No. CR20122191001
The Honorable Kenneth Lee, Judge

**AFFIRMED**

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COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By Tanja K. Kelly, Assistant Attorney General, Tucson
*Counsel for Appellee*

Isabel G. Garcia, Pima County Legal Defender
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*Counsel for Appellant*

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**MEMORANDUM DECISION**

Presiding Judge Miller authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Espinosa concurred.

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**¶1** Amber Bailey was convicted after a jury trial of two counts of transportation of marijuana for sale and sentenced to mitigated, concurrent terms of three years' imprisonment. On appeal, she argues the trial court erred when it denied her motion to suppress evidence obtained as a result of an investigatory stop.[1] For the following reasons, we affirm.

**Factual and Procedural Background**

**¶2** We limit our factual review to those presented at the suppression hearing and consider them in the light most favorable to sustaining the trial court's ruling. *See State v. Gonzalez*, 235 Ariz. 212, ¶ 2, 330 P.3d 969, 970 (App. 2014). Bailey contends we must limit our review to the uncontroverted facts because the trial court made no findings of fact to support its ruling. Our review is not so limited because "[i]f the trial court has not articulated specific findings, we will infer those factual findings reasonably supported by the record that are necessary to support the trial court's ruling."

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[1]In her appellate briefs, Bailey also argued the trial court erred by assessing an attorney fee and an indigent defense assessment fee even though she retained private counsel after arraignment. Due to a discrepancy between oral sentencing and the sentencing minute entry, we suspended the appeal and revested jurisdiction in the trial court to clarify its sentencing order. The court vacated the order of attorney and indigent assessment fees, and Bailey subsequently withdrew as moot her argument on that issue.

*State v. Organ*, 225 Ariz. 43, ¶ 10, 234 P.3d 611, 614 (App. 2010). Further, "[i]n the absence of conflicting facts and inferences, remand [for further factual findings] is unnecessary." *State v. Boteo-Flores*, 230 Ariz. 551, ¶ 10, 288 P.3d 111, 114 (App. 2012) (trial ruling affirmed based on record despite incorrect legal conclusion on related issue). Bailey did not challenge the veracity of the statements made by the witnesses at the suppression hearing, nor does she challenge them on appeal. We therefore consider the facts presented at the hearing.

**¶3** United States Postal Inspector S.F. testified he had twenty-three years of experience as a postal inspector and had seized more than five hundred drug parcels in the previous two years. In May 2012, S.F. received four boxes that had been intercepted after being mailed at a private shipping store. As part of his assessment regarding whether the boxes might contain illegal drugs, he considered several factors: they were about the same size, packaged and sealed identically, mailed from the same store, and addressed to the Miami area, which is a common destination for marijuana parcels. The labels had the same handwriting, but the sender names and addresses were different. None of the return addresses matched the listed sender name, and at least one had no matching address. The boxes were packed "solidly" with a heavy center mass, which is characteristic of marijuana packed in the middle and surrounded by spray-in insulation. They had been mailed two at a time, using cash as payment. S.F. requested a dog inspect the parcels, but the dog did not alert. He explained at the hearing that dogs do not always alert because drug parcels are often packed to mask odors.

**¶4** S.F. also testified about surveillance videos showing the same woman delivered both sets of boxes. She drove a silver Chevrolet Traverse to the store and had been a frequent customer who regularly mailed parcels, always paying in cash. Two days after he received the boxes, he was conducting surveillance on an apartment linked to a different drug investigation when he noticed a silver Chevrolet Traverse, but did not see anyone in it. He returned to the apartment twelve days later and saw a woman resembling the

woman from the surveillance videos get in the vehicle and leave. S.F. tried to follow, but lost sight of the vehicle in traffic.

**¶5** Later that day, S.F. was at a contract post office with two other postal inspectors, interviewing a suspect from a separate investigation when he saw the same woman arrive in a silver Chevrolet Traverse and walk into the post office. He instructed the other postal inspectors to stop her and inquire about the four boxes. As the woman was leaving in her vehicle, the postal inspectors approached and told her to stop. She was later identified as Bailey.

**¶6** At trial, the state introduced evidence that Bailey admitted sending the four boxes and consented to their search as well as two more boxes found in Bailey's vehicle at the time of the stop. All six boxes contained marijuana. She was thereafter charged with two counts of transportation of marijuana for sale, convicted, and sentenced as described above. This appeal followed.

**Motion to Suppress**

**¶7** Bailey first argues the trial court used the incorrect legal standard in denying her motion to suppress evidence obtained after she was stopped by the postal inspectors, contending the court incorrectly concluded the encounter with Bailey was consensual. Both parties, however, presented the issue to the court as a question of reasonable suspicion supporting an investigative seizure pursuant to *Terry*,[2] not a consensual encounter, although the trial court's ruling was unclear.[3]

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[2]*Terry v. Ohio*, 392 U.S. 1 (1968).

[3]The trial court concluded, "I think the officer had sufficient reason to approach and talk to Ms. Bailey, so I'm not going to suppress the evidence." The "approach and talk" language is consistent with consensual encounter cases. *See, e.g.*, *Florida v. Royer*, 460 U.S. 491, 497 (1983); *State v. Serna*, 235 Ariz. 270, ¶ 8, 331 P.3d 405, 407 (2014). But a "sufficient reason" is not required for a consensual encounter. *See United States v. Mendenhall*, 446 U.S. 544, 554 (1980); *State v. Robles*, 171 Ariz. 441, 443, 831 P.2d 440, 442 (App.

**¶8** The state appears to concede on appeal that Bailey was seized because her car was in reverse by the time the postal inspectors asked her to stop the car "under authority of law," and she complied. We agree. A seizure occurs when a law enforcement officer restrains a citizen's liberty through physical force, or, as occurred here, when the citizen submits to a show of lawful authority. *See State v. Childress*, 222 Ariz. 334, ¶ 10, 214 P.3d 422, 426 (App. 2009); *see also California v. Hodari D.*, 499 U.S. 621, 626 (1991).

**¶9** Even assuming the trial court improperly concluded the encounter was consensual, however, we are entitled to uphold a court's ruling on a motion to suppress if legally correct for any reason. *See Boteo-Flores*, 230 Ariz. 551, ¶ 7, 288 P.3d at 113. We must analyze whether the postal inspector properly seized Bailey pursuant to an investigatory stop. A law enforcement officer may make a limited investigatory stop if the officer has "articulable, reasonable suspicion, based on the totality of the circumstances, that the suspect is involved in criminal activity." *State v. Teagle*, 217 Ariz. 17, ¶ 20, 170 P.3d 266, 271-72 (App. 2007). We review de novo whether a law enforcement officer had reasonable suspicion. *State v. Fornof*, 218 Ariz. 74, ¶ 5, 179 P.3d 954, 956 (App. 2008).

**¶10** Bailey argues S.F. did not have reasonable suspicion to conclude she was engaged in criminal activity at the time of the stop. She also contends that any suspicion she was involved in a past crime was diminished because the crime had not been "confirmed" by further investigation. Although she concedes a *Terry* stop may be reasonable to investigate a "completed felony offense," she argues that the "reasonableness of the suspicion required . . . is heightened" when the crime is no longer in progress, and that there was no "completed felony" in her case because S.F. had not applied for a warrant after his initial review of the boxes.

**¶11** Bailey relies on *United States v. Hensley*, 469 U.S. 221, 228-29 (1985), to argue that law enforcement officers must have heightened suspicion when stopping a person suspected of a

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1992) (police need no justification to walk up to parked car and ask questions of occupants).

completed crime, compared to when a crime is occurring or is about to occur. While *Hensley* does state that the "balance may be somewhat different," the Court concluded, "[W]here police have been unable to locate a person suspected of involvement in a past crime, the ability to briefly stop that person, ask questions, or check identification in the absence of probable cause promotes the strong government interest in solving crimes and bringing offenders to justice." *Id.* The Court upheld the investigatory stop based on a flyer issued by a different police department of a defendant who was suspected of committing an armed robbery two weeks earlier. *Id.* at 225, 236. Here, there were four boxes that in S.F.'s experience exhibited many characteristics of drug packages. Although he did not know the sender's name, he could identify her and her vehicle. Moreover, he had unsuccessfully attempted to follow her earlier that day. S.F.'s authority to stop her and ask questions promoted the strong government interest in solving crimes. Likewise, the above factors coupled with S.F.'s years of experience in drug interdiction support the conclusion that he had reasonable suspicion to stop Bailey.[4] *See Fornof*, 218 Ariz. 74, ¶¶ 6, 9, 19, 179 P.3d at 956, 957, 959 (reasonable suspicion of drug sale where officer observed items changing hands at night in area known for drug-related activity); *Gomez*, 198 Ariz. 61, ¶¶ 3, 18, 6 P.3d at 766, 768 (reasonable suspicion for stop of truck after 9-1-1 caller reported gun pointed out window).

[4]The state argues that S.F. also had reasonable suspicion that Bailey was in the process of committing another crime because she was at a post office when she was stopped. Neither S.F. nor the inspector who testified about stopping Bailey indicated they suspected her of anything other than being the woman from the surveillance videos. Although her location at the time of the stop is arguably a fact that may be considered in the "totality of circumstances" supporting the stop, we find S.F. had reasonable suspicion supporting the stop based on the completed felony, and need not address whether there was reasonable suspicion of an ongoing crime.

**¶12** Bailey also relies on *United States v. Monteiro*, 447 F.3d 39 (1st Cir. 2006), for the proposition that there must be confirmation of a completed felony to support a reasonable suspicion to stop. In *Monteiro*, police received a secondhand tip that gunfire had come from a car with a specific license plate on a specific street. *Id.* at 41. The person who spoke to police refused to give them the name of the person who had witnessed the gunfire. *Id.* Officers went to the street but could find no evidence of gunfire, and no one else had reported gunfire in the neighborhood. *Id.* In reviewing the trial court's suppression of evidence, the key issue was the reliability of the anonymous tip. *Id.* at 44-50. Bailey particularly relies on the court's observation that "[q]uestionable *Terry* stops may become even less reasonable if 'the police have had the time to develop' better grounds for the stop but have failed to do so." *Id.* at 49, *quoting United States v. Hudson*, 405 F.3d 425, 437 (6th Cir. 2005).

**¶13** *Monteiro* is distinguishable in several respects. In that case, the stop was "[q]uestionable" because it was based on an uncorroborated anonymous tip. *Id.* Here, there was no anonymous tip. Rather, S.F. developed his own suspicions based on his direct observations of the boxes and surveillance tapes and his experience investigating similar boxes packed with drugs. *See Fornof*, 218 Ariz. 74, ¶¶ 6, 9, 19, 179 P.3d at 956, 957, 959.

**¶14** Bailey cites no further authority to support her argument that the felony must be confirmed to be completed, nor what the threshold is for confirming a felony. Indeed, several cases indicate there is no requirement that the officer be certain a felony has occurred. *See State v. Evans*, 235 Ariz. 314, ¶¶ 3-5, 24, 332 P.3d 61, 62-63, 67-68 (App. 2014) (deputy who briefly witnessed driver flailing arms at passenger, but did not witness any contact, had reasonable suspicion of domestic violence); *State v. Ramsey*, 223 Ariz. 480, ¶¶ 3-7, 26, 224 P.3d 977, 979, 982 (App. 2010) (officers who observed defendant evading police in high crime area had reasonable suspicion to stop defendant); *State v. Gomez*, 198 Ariz. 61, ¶¶ 3, 18, 6 P.3d 765, 766, 768 (App. 2000) (reasonable suspicion to stop truck where 9-1-1 caller stated passenger had previously pointed gun out window).

**¶15** Bailey also argues there was no reason to stop her "at a time and location wholly separate" from the location of the crime, relying on *Commonwealth v. Melendez*, 676 A.2d 226, 292 (Pa. 1996). The court in *Melendez*, however, noted that "*Terry* stops . . . are designed to address immediate suspicions of current illegal conduct," *id.*, without addressing the holding in *Hensley* that officers may stop a person to investigate a past crime, *see* 469 U.S. at 229. Additionally, in *Melendez*, police "had observed no criminal activity on the part of [the defendant]," where here, S.F. had identified Bailey as the woman who dropped off the suspicious packages. *See id.* at 227. Finally, Bailey cites to no Arizona cases, and we are aware of none, in which law enforcement officers lacked reasonable suspicion because the stop occurred away from the location of the suspected crime.

**¶16** Bailey also appears to argue the seizure was unreasonable because S.F. held the boxes for two weeks. She cites one case in which the Ninth Circuit Court of Appeals determined the length of the warrantless seizure of a package was unreasonable. *See United States v. Dass*, 849 F.2d 414, 414-15 (9th Cir. 1988). But she did not argue below, nor does she argue on appeal, that the seizure of the boxes themselves violated her rights. The case cited is inapplicable to her argument that S.F. lacked reasonable suspicion to detain her person. The trial court did not err in denying Bailey's motion to suppress.

## Disposition

**¶17** For the foregoing reasons, Bailey's convictions and sentences are affirmed.